No. 3319

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY
(a corporation),
Appellant,

vs.

HUGH MACKAY,
Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

This is an appeal from an order of the Arizona District Court confirming the sale of certain mining property owned by appellant.

The property was sold to the mortgagee, appellee herein, for the amount of the judgment and costs.

The price paid for it—$27,574.28—is admittedly only one-quarter of its market value.

If the sale is confirmed appellant will lose its valuable property at a sacrifice of at least seventy-five thousands of dollars. If the sale is set aside appellee can lose nothing.

We submit that upon such a showing this Court should reverse and set aside the order of confirmation if any irregularity appears in the proceedings.

That there was irregularity, and irregularity of a grave and damaging character, in the conduct of the sale plainly appears from the record. This irregularity is such that, coupled with the gross inadequacy of price, it must, in our opinion, result in the reversal of the order of confirmation.

WHERE THE PRICE BID FOR THE PROPERTY IS INADEQUATE THE COURT WILL SET ASIDE THE SALE FOR EVEN SLIGHT IRREGULARITY OR UNFAIRNESS.

The undisputed evidence shows that the property here in question is worth in excess of one hundred thousand dollars (Affidavit of A. Lafave, Trans. p. 51). It was sold to appellee for the amount of the judgment and costs—$27,574.28. So that admittedly the property was sold for only one-quarter of its actual value.

In this connection it is important to note that the value of silver has more than doubled since the sale of these properties. The value of the mines has, of course, also proportionately increased. So that a sale at this time could be made to much greater advantage.

Inadequacy of price so gross as to shock the conscience has been held in itself to be a sufficient reason for setting aside a judicial sale. This is the rule in Arizona.

McCoy v. Brooks, 9 Ariz. 157, 80 Pac. 365.

But even though the inadequacy of price is not so gross as to justify the setting aside of the sale on that account alone, it is well settled that where such inadequacy of price exists very slight additional circumstances of unfairness or irregularity will be held sufficient to necessitate the setting aside of the sale.

The rule in this regard is thus stated in Cyc.:

> "When in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, or any apparent unfairness or impropriety, the sale may be set aside, although such additional circumstances are slight and, if unaccompanied by inadequacy of price, would not furnish sufficient ground for vacating the sale."
>
> 24 Cyc. 39-40.

The decisions are uniformly to this effect:

> "If there are irregularities, although slight, coupled with an insufficient price, the sale will be set aside."
>
> Bondurant v. Bondurant, 96 N. E. 306, 308 (Ill.)

> "Inadequacy of price, taken alone, is seldom if ever sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case, slight additional circumstances only are required to authorize the setting aside of the sale."
>
> Means v. Rosevear, 42 Kan. 377, 383; 22 Pac. 319.

> "Where the price bid is greatly disproportioned to the actual value of the property, only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside."
>
> Bean v. Hoffendorfer, 2 S. W. 556, 558 (Ky.).

This rule is well recognized by the Supreme Court of the United States.

> "While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience."
>
> Schroeder v. Young, 161 U. S. 334, 40 L. Ed. 721.

See also:

> Graffam v. Burgess, 117 U. S. 180, 29 L. Ed. 839;
>
> Ballentyne v. Smith, 205 U. S. 285; 51 L. Ed. 803.

The undisputed facts bring this case clearly within the rule above enunciated. The price paid for the property is grossly inadequate, and under the rule announced by the Supreme Court of Arizona in McCoy v. Brooks, *supra,* the order of confirmation should be set aside on that ground alone.

But even if the Court should consider that the inadequacy of the price taken alone is not sufficient to justify the setting aside of the sale, that inade-

quacy is an element to be seriously considered in connection with any irregularity or unfairness in the conduct of the sale. And in view of the great inadequacy of price any additional element of unfairness or irregularity, however slight, should be held sufficient to turn the scale in favor of appellant.

With this principle in mind we shall proceed to a consideration of circumstances which in our judgment constituted, not slight, but grave irregularity.

THE FAILURE TO DESIGNATE A PARTICULAR HOUR OF SALE IN THE NOTICE INVALIDATED THE SALE.

The decree provides that the Master give "public notice of the *time* and place of said sale" (Trans. p. 23).

The notice of sale provided for the time of sale as follows (Trans. p. 38):

"Between *the legal hours of sale* on Wednesday, the 12th day of June, 1918".

The legal hours of sale for real estate in Arizona are fixed by statute from 10 A. M. to 4 P. M., so that the notice fixed a period of six hours during which the sale might be held.

The purpose of advertising a sale of this character is to attract as many bidders as possible to the sale in order that the property may bring as high a figure as can be obtained. It is obvious on the face of it that a notice of this character, specifying a period of six hours during which the sale might be

held, far from encouraging prospective bidders to attend, would actually discourage them from attending. No one, unless his interest in the particular property was very great, would put himself to the inconvenience of attending at 10 o'clock A. M. with the possibility of having to wait in uncertainty until 4 o'clock P. M. As well might a person invite a friend to meet him for lunch between 10 o'clock and 4 o'clock and expect the friend to accept his invitation with alacrity and gratitude. As well might a theatre advertise that its curtain would rise sometime between 6 and 10 P. M. and the manager expect the public to storm the box office for tickets. Human nature is not so constructed. We demand, and demand rightly, that others shall show a reasonable respect for the value of our time. It is not many men who would feel that they could afford to wait six hours in the Arizona sun for an opportunity to bid upon any property, however valuable. We feel justified in asserting that ninety-nine out of every one hundred reading such a notice as this would refuse to inconvenience themselves to the extent of attending the sale with the possibility of having to waste five or six hours awaiting the convenience of the Master. The man who would place so little value upon his time would in the great percentage of cases be of that class who have more time than money. Common sense would dictate to an individual who was compelled to sell his own property at public auction to fix a definite hour for the benefit of the bidding public. Common jus-

tice should dictate to the Master who is selling another's property to do as much. Unless the public sale is made reasonably attractive to the bidding public why go through the hollow form of holding the sale in public? The mortgagee could purchase just as well in private behind closed doors.

It seems so obvious to us that a notice of sale fixing a period of several hours during which the sale may be held is unreasonable, that we were surprised to find any authority to the contrary. However, there are a few cases, none of them decided within the last thirty or forty years, holding such a notice sufficient.

We have looked in vain for any authority on this question in the Federal Courts or in the State of Arizona; so that the question in this Court is one of first impression. We respectfully urge that in deciding this point this Court should take what in our opinion is the only fair, just and common sense view of the matter; that it should establish a rule which will render impossible any chance of collusion between the Master and the judgment creditor to prevent public competition, and which will insure to the owner of the property the advantages of free and full public bidding which the law intends that he should have; that it will place itself in line with the modern trend of judicial authority, and establish the rule in this jurisdiction that in advertising judicial sales a definite and certain hour must be fixed for the sale to take place.

In support of this rule we direct the Court's attention to the following authorities:

Fitzpatrick v. Fitzpatrick, 6 R. I. 64;
Bondurant v. Bondurant, 96 N. E. 306 (Ill.);
Jensen v. Andrews, 163 N. W. 571 (S. D.);
Hayes v. Pace, 78 S. E. 290; 162 N. C. 288.

In Fitzpatrick v. Fitzpatrick, *supra,* the Supreme Court of Rhode Island said:

> "The notice of sale under Donnelly's mortgage * * * is, upon inspection, found defective in the undispensable requisites of naming the time, to wit, *the hour of the day,* and the place of sale. Such a defect defeats the whole purpose of the notice, which, as we view it, is *to bring together such a body of purchasers* as by fair competition will insure, as far as this goes, a full price for the subject of sale." (Italics ours.)

In Bondurant v. Bondurant, *supra,* the Illinois Supreme Court said (96 N. E. 308):

> "If there is illegality or irregularity sufficient to avoid a sale, the court will refuse approval, and if there are irregularities, although slight, coupled with an insufficient price, the sale will be set aside (Citing cases).
>
> In this case there was not only inadequacy of price, but *a most serious irregularity,* to say the least, *in failing to state any hour for the sale."* (Italics ours.)

In Hayes v. Pace, *supra,* the North Carolina Court was considering an appeal from an order refusing to dissolve a temporary injunction forbidding the making of a deed to a purchaser at a

judicial sale. On the point here in question the Court said (162 N. C. 293-4):

> "The affidavits not only show abundant evidence of collusion * * * but it appears further that the advertisement of sale mentioned no hour when the sale was to take place.
>
> In 27 Cyc. 469, the rule with respect to the time and place of sale is stated as follows: 'The notice must specify the place at which the sale will be held with a degree of certainty that intending bidders will not be misled, but will be able to find it, and it must also give *the time of the sale with equal certainty,* stating not only the day, *but also the hour* at which it will be held'. Fitzpatrick v. Fitzpatrick, 75 Am. Dec. 681.
>
> The omission of such an essential requisite to make a valid sale is strong evidence of a fraudulent purpose to deceive and mislead probable bidders. This fact alone is sufficient to justify the judge in continuing the injunction, and *if it be shown at the final hearing that no time of sale was given in the advertisements, the sale should be set aside.*" (Italics ours.)

In Jensen v. Andrews, *supra,* the Court discussed the question here involved at great length. We quote as follows from that decision (163 N. W. 571-2):

> "It is the contention of respondent that said notice of sale was fatally defective by reason of its failure to specify the hour of day at which said sale would take place, and that by reason thereof the said sale and all the foreclosure proceedings, including the sheriff's deed to appellant, were void. We are of the opinion that respondent is right in this contention. Section 640, Code of Civil Procedure, prescribes the form and contents of notice of foreclosure

sale by advertisement, and among other things provides that the notice of sale must specify the time and place of sale. Section 641 of the same code provides that the sale must be made at public auction between the hours of 9 o'clock in the forenoon and the setting of the sun on that day. It is the contention of appellant that a notice of sale, specifying the day only, is sufficiently specific as to time when taken in connection with the provisions of section 641. We are of the view, however, that this contention is untenable. We are of the view that sections 640 and 641 must be construed together; that under section 640 *the specific hour of the day must be stated*, at which the sale will be made; and that under section 641 that specific hour must be within the time included and mentioned in section 641. * * * It seems to be generally held, under statutes containing the provision that the notice must specify the 'time and place of sale', that the notice must specify the place with such degree of certainty that intending bidders will not be misled, and it must also give the time of the sale with equal certainty, stating not only the day *but also the hour* at which it will be held. * * *

The object and purpose of specifying the time in a notice of public sale is *to advise and secure the presence of persons who might desire to bid upon and purchase the property to be sold.* The naming of *the specific hour* in a notice of public sale would have a tendency to secure a *greater number of purchasers and bidders* at such sale than a notice merely naming the day, as it might be a *great inconvenience to some intended or prospective bidders and purchasers to remain at the place of sale many hours of the day in uncertainty as to the time when such sale would take place.* We are of the view that section 640 of our Code requires the specific hour of the day to be named."

These cases seem to us to be conclusive on this question.

If we look to the Arizona statute we likewise find that the Legislature of the State of Arizona evidently contemplated the fixing of a precise hour in such a notice of sale.

Section 1367 of the Arizona Civil Code of 1913 provides for notices of sale, giving "time and place".

Section 1369 provides for postponements of sale as follows:

> "The sheriff or other officer may postpone the the sale from time to time. In case of such postponement the posting and publication of notice, if it be published, must be continued until the day to which the sale is postponed, and there shall be appended at the foot of the published and posted notice a memorandum in substantially the following form:
>
> "'The above sale is postponed until the..... day of....., 19....., at ..... o'clock .....M.
>
> Sheriff (or other official title as the case may be).'"

It is well settled that all parts of a statute must be construed together to make a harmonious whole. The provision for a notice of postponement to "..... o'clock .....M." indicates that a particular hour must be named. But certainly no more particularity in this regard will be required of the notice of postponement than of the original notice.

The case of Evans v. Robberson, 92 Mo. 192, cited in appellee's brief, was a case of a collateral attack

upon a sale. In such a case, of course, the presumptions are all in favor of the validity of the sale.

In the later case of Holdsworth v. Shannon, 21 S. W. 85, the Missouri Court set aside a sale held at 10:30 A. M. on the ground that the hour was unusual and that such sales by custom were usually made between 1 and 2 P. M. This is obviously a recognition by the Missouri Court of the unreasonableness of its earlier decision.

In summing up this point we respectfully submit that the precise hour of sale should be given in the notice; that the failure to give the precise hour defeats the very purpose of the notice which is to secure the attendance of as many bidders as possible; and that to hold otherwise will be to open the door to possible collusion and unfairness at the property owner's expense at the worst, and at the best to deprive him of the opportunity of securing a fair price for his property which a full attendance of bidders would tend to insure.

In this case the property did not bring a fair price. Can this Court conscientiously hold that a notice of the character here in question was calculated to secure a fair price for the property?

THE NOTICE OF SALE WAS DEFECTIVE IN IMPROPERLY DESCRIBING THE PROPERTY.

The property sold consisted of a great number of mines and there is upon these mines a great deal of personal property such as machinery, hoists, engines,

mills, etc. The notice of sale simply mentions these in a general way, without describing them with any particularity or definiteness (Trans. p. 39).

In

Robertson Mfg. Co. v. Chambers, 77 Atl. 287 (Md.),

it was held that a notice which failed to describe an office and stable as part of the property was fatally defective. Certainly the failure to particularly describe valuable mining accessories is equally objectionable.

But there was a further and more serious mistake in the description.

The two mortgages, Exhibits "B" and "E", Transcript pp. 68 and 72, reserved to the mortgagor the right to work the mines and remove the ore therefrom in the usual manner until the property shall have been sold and *conveyed* under foreclosure proceedings.

On page 69 of the transcript we read:

> "In executing this instrument the Mortgagor reserves the right to mine ore and to operate this property in the usual and customary way of mining and operating such property, taking and using any and all proceeds, incomes and profits from said property as fully and to the same extent as if this indenture had not been made, until the property may be sold and conveyed under this mortgage by reason of the default of the payment provided herein, in event that such default should occur."

The other mortgage likewise provides (Trans. p. 74).

> "Until default shall be made in payments of principal, interest, or some of them, or until defaults shall be made in respect to something herein required to be done, performed or kept by said party of the first part, and until the property herein conveyed shall have been sold and conveyed to said party of second part or his assigns or other purchaser by reason of such default, the said party of the first part shall be suffered and permitted to possess, operate, manage, lease, use and enjoy the said property hereby conveyed and every part and parcel thereof, with the full right and privilege of developing, mining, breaking down, extracting, milling, removing, selling and disposing of any and all ores and products of said property and of taking and using any and all proceeds, rents, royalties, products, incomes or profits from the said property as fully and to the same extent as if this indenture had not been made."

The notice of sale contained no mention of this reservation to the mortgagor of the right to mine the property until it was actually *conveyed;* and the Master purported to sell the property without any such reservation. No conveyance could be executed until the time for redemption had run—six months after the sale by Arizona statute. It follows that appellant was deprived of a most valuable right secured to him by his mortgage. He might conceivably have taken out enough ore during the redemption period to have enabled him to redeem the property. In any event he was deprived of a valuable property right in direct violation of the terms of his mortgages. We submit that in advertising and

selling appellant's property so as to deprive him of this right to work the mines pending the final execution of a conveyance the Master acted in such direct contravention of the express provisions of the mortgages that the sale must be set aside.

THE SALE WAS MADE AT A TIME WHEN A PROPER PRICE COULD NOT BE SECURED.

The sale was made at a time when the Federal Government was actually prohibiting the formation of corporations, the sale of stocks, and the construction of buildings, roads, etc. It was likewise discouraging all private investments and encouraging investments in government bonds and activities directly tending to win the European War. It is obvious that the property could not bring a reasonable value at public sale at such a time.

A sale for an inadequate price will be set aside if made at a time of financial depression.

Johnson v. Avery, 57 N. W. 217;
Johnson v. Avery, 62 N. W. 283.

Or during a pestilence which discourages public bidding and depresses prices.

Littell v. Kuntz, 2 Ala. 256;
Kirkland v. Texas, etc. R. Co., 57 Miss. 316.

It should equally be held that a sale of this character for a grossly inadequate price, made at a time when, owing to a great war, the government is discouraging private investments and construction work of every character, should be set aside.

In conclusion we respectfully submit that the order of confirmation must be set aside for the following reasons:

1. That the price for which the property was sold is grossly inadequate;

2. That the notice of sale was fatally defective in not fixing a specific hour for the sale;

3. That the notice of sale did not sufficiently or accurately describe the property, and in particular that it described and the Master sold valuable property rights reserved by the mortgages to appellant;

4. That the sale was made at a time when it was impossible to realize the value of the property by reason of Government regulations in connection with the war;

5. That these various irregularities must be given additional weight by the Court because of the inadequacy of price;

6. That the property was sold to the mortgagee for the amount of the judgment and costs and therefore he cannot be injured by a resale, whereas if this sale is to stand appellant is deprived of valuable properties at a loss of at least $75,000.00.

It is respectfully submitted, therefore, that the order confirming the sale should be reversed and vacated.

Dated, San Francisco,
June 18, 1919.

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